Steamfitters Local Union No. 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Contra Costa Electric, Inc.) *and* Joe Jacoby. Case 32–CB–4435

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On December 5, 1995, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Building and Construction Trades Department of the AFL–CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, filed amicus curiae briefs in support of the Respondent. The General Counsel filed limited cross-exceptions and a brief in response to the briefs filed by the Respondent and amici.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue before us is whether the Respondent Union violated its duty of fair representation and Section 8(b)(1)(A) and (2) of the Act by negligently failing to refer the Charging Party, Joe Jacoby, to a job in the proper order from its exclusive hiring hall. The judge, following recent Board precedent, answered that question in the affirmative. The Union and amici urge that that precedent cannot be reconciled with Supreme Court decisions concerning the nature of the duty of fair representation. On reflection, we find ourselves in agreement with the Union and amici, and we shall dismiss the complaint.

The facts are straightforward and undisputed. The Union has an exclusive hiring hall arrangement with Contra Costa Electric, which is a contractor on the Tosco refinery project in Martinez, California. Jacoby, a member of the Union for some 27 years, registered for referral on December 21, 1994. When he did so, he mentioned to Larry Blevins, the Union's business representative, that he wanted to work at the Tosco project. When Jacoby came to the hiring hall in February 1995 to inquire about the job, Blevins told him he thought he had already dispatched him. Although the judge found that Blevins did think he had called Jacoby and left a message on his answering machine, there is no record of such an attempt. Jacoby was not dispatched from the hiring hall until February 17.

During the time Jacoby was on the out-of-work list awaiting referral, several individuals with lower referral priorities were dispatched ahead of him, in violation of the hiring hall rules. There is no evidence, and no allegation, that the failure to dispatch Jacoby in the proper order was the result of any sort of animus toward him or, indeed, that it was anything other than an oversight.

The judge nevertheless found that the Union had violated its duty of fair representation with respect to Jacoby, and thus had violated Section 8(b)(1)(A) and (2). She relied on established Board precedent that

> even assuming the absence of specific discriminatory intent . . . any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.[2]

More specifically, the judge relied on *Iron Workers Local 118 (California Erectors)*,[3] in which the Board found that the union's inadvertent failure to refer an applicant from its exclusive hiring hall violated Section 8(b)(1)(A) and (2), even though no invidious or unfair considerations had been shown. The Board specifically found that, in such circumstances, negligence is not a cognizable defense.

The Union and amici contend, however, that such a result is foreclosed by the Supreme Court's decisions in *Steelworkers v. Rawson*[4] and *Air Line Pilots Assn. v. O'Neill*, construing the duty of fair representation.[5] In *Rawson*, the Court reiterated its holding in *Vaca v. Sipes*,[6] that a union breaches its duty of fair representation only by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith."[7] The Court then noted that "The courts have in general assumed that *mere negligence*, even in the

[1] The General Counsel also suggests that the Board should not reverse the judge without holding oral argument and receiving amicus curiae briefs from all interested parties. The suggestion is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] *Operating Engineers Local 406 (Ford, Bacon, & Davis Construction)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). Sec. 8(a)(3) proscribes employer discrimination in hiring that encourages or discourages union membership; Sec. 8(b)(2) forbids unions to cause or attempt to cause employers to discriminate in violation of Sec. 8(a)(3). In an exclusive hiring hall, where the union controls the referral of applicants for employment, the union violates 8(b)(2) if it bases referrals on union membership or if its referral process otherwise tends to encourage or discourage union membership. See generally *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954) (Sec. 8(a)(3) prohibits only such discrimination as encourages or discourages union membership).

[3] 309 NLRB 808 (1992).

[4] 495 U.S. 362 (1990).

[5] 499 U.S. 65 (1991).

[6] 386 U.S. 171 (1967).

[7] Id. at 190.

enforcement of a collective-bargaining agreement, *would not state a claim for breach of the [duty], and we endorse that view today.*"[8] In *O'Neill*, the Court specifically rejected the suggestion that the duty of fair representation is governed by different standards in different contexts, holding that the three-pronged *Vaca v. Sipes* standard applies to "*all* union activity."[9] The Court also specifically noted that the duty of fair representation applies when a union operates a hiring hall.[10] Thus, even though neither *Rawson* nor *O'Neill* was a hiring hall case, the Union and amici argue that, together, those decisions establish that negligence in the operation of a hiring hall does not violate the duty of fair representation.

The judge rejected this line of argument. She noted the Supreme Court's statement in *Breininger v. Sheet Metal Workers Local 6*[11] that "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*."[12] She also relied on a recent decision of the D.C. Circuit in which that court found that, by equating "arbitrary" with "irrational," the Supreme Court in *O'Neill* had not meant to weaken the standard of review applicable to unions' operation of exclusive hiring halls.[13] Rather, the court found, "a union's operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer."[14] The judge also noted that the Board had decided *California Erectors* after the Supreme Court's decision in *O'Neill*, and therefore inferred that the Board had adhered to its view that the negligent failure to refer an applicant in the proper order from an exclusive hiring hall constitutes arbitrary conduct that violates the duty of fair representation and Section 8(b)(1)(A) and (2).

Although the judge was correct in her reading of *California Erectors*, we agree with the Union and amici that that decision is inconsistent with Supreme Court precedent[15] To begin with, even though *O'Neill* and *Rawson* were not hiring hall cases, the Supreme Court's statements in those decisions concerning the nature of the duty of fair representation persuade us that the Union did not violate its duty by failing to dispatch Jacoby in the proper order. Thus, the Court in *Rawson* reiterated the *Vaca v. Sipes* standard, that the duty of fair representation is breached only by conduct that is "arbitrary, discriminatory, or in bad faith," and also endorsed the view that the duty is not breached by conduct that constitutes "mere negligence." In *O'Neill*, the Court held that the *Vaca v. Sipes* standard applies to all union conduct, and noted that the duty of fair representation applies to the operation of hiring halls. We read these decisions together to mean that "mere negligence" in the operation of an exclusive hiring hall does not give rise to a claim for breach of the duty of fair representation, even by an applicant who loses an employment opportunity as a result of the union's mistake**.** Accordingly, to the extent that *California Erectors* and other decisions of the Board hold to the contrary, they are overruled.

We do not believe that our conclusion is incompatible with the Court's statement in *Breininger* that, under the duty of fair representation, a union's responsibility to exercise its power fairly "increases" to the extent that it takes on functions similar to those of an employer in operating a hiring hall**.** That statement must be understood in the context in which it was made**,** that is, as a response to a contention by the union respondent in that case that the duty of fair representation did not apply *at all* in the hiring hall context because the union was acting essentially as the employer in matching up job requests with available personnel, rather than as a representative of the employees. In firmly rejecting that proposition, the Court noted that the union obtained the power to refer workers for employment through the hiring hall only because of its status as the employees' representative and by virtue of the power it exercised under the collective-bargaining agreement. The key, the Court said, was that in operating the hiring hall, the union was administering a provision of the contract, a function which had always been found to be subject to the duty of fair representation. In operating the hiring hall, then, the union was not relieved of its duty simply because it was performing a function that "might be seen as similar to what an employer does."[16]

Read in context, we do not believe that the Court's subsequent observation that a union's responsibility under the duty of fair representation "increases" when it operates a hiring hall was intended to mean that the union is subject to a higher standard in operating a hiring hall than in performing other representational functions, particularly since the Court, earlier in *Breininger*, de-

[8] 495 U.S. at 361–362 (emphasis added).

[9] 499 U.S. at 67 (emphasis added).

[10] Id. at 77.

[11] 493 U.S. 67 (1989).

[12] Id. at 89 (emphasis in the original).

[13] *Plumbers Local 32 (Alaska Pipeline) v. NLRB*, 50 F.3d 29, 33 (D.C. Cir. 1995), cert. denied 516 U.S. 974 (1995).

[14] 50 F.3d at 33. The court, citing *Breininger*, also characterized the union's increased responsibility in operating a hiring hall as "a high standard of fair dealing." Id. at 34.

[15] We note that *California Erectors* failed to mention either *O'Neill* or *Rawson*, and thus did not effectively come to grips with the issue before us.

Member Hurtgen finds that *California Erectors* is distinguishable. In that case, the union gave a false reason for the nonreferral and thus the nonreferral was "unexplained." An "unexplained" failure to refer is, by definition, arbitrary conduct and thus in breach of the duty of fair representation. The Board further held that the union's asserted negligence was not *a defense* to this conduct. By contrast, in the instant case, the union *does* give an explanation for its nonreferral, i.e., that it was negligent, and the General Counsel asserts that such negligence *is the basis for the violation.*

[16] 493 U.S. at 89.

scribed the union's duty in hiring hall cases in terms similar to those it has used in other contexts**,** as a duty to exercise its authority "in a nonarbitrary and nondiscriminatory fashion."[17] Rather, we understand the Court to be making the point that when a union by virtue of a collective-bargaining agreement takes on additional areas of authority with respect to the employees it represents, such as the authority to control referrals through a hiring hall, it also takes on additional responsibilities, in that its duty of fair representation is necessarily expanded into those areas. This reading is consistent with the Court's oft-repeated statement that under the duty of fair representation, a bargaining agent has responsibility "equal in scope to its authority."[18] It is also consistent with the Court's decision in *O'Neill*, which specifically rejected the suggestion that the duty of fair representation is governed by different standards in different contexts and held that the *Vaca v. Sipes* standard applies to "all union activity."[19]

That the negligent failure to refer an applicant from an exclusive hiring hall may cost him an employment opportunity does not require a different result. The Board has consistently found that the duty of fair representation is not breached by mere negligence in other settings, even when it leads proximately to loss of employment. Thus, the Board has held that a union's negligent failure to process a meritorious discharge grievance in a timely fashion does not constitute a breach of the duty of fair representation, even where, as a result of the union's negligence, the grievance becomes time-barred and the grievant is therefore prevented from obtaining relief.[20] The Board also has found no breach of the duty of fair representation when a union negligently failed to give the strike notices required under Section 8(d), even though the result of the union's negligence was that strikers represented by the union lost their statutory protection and were discharged.[21]

Our decision today is consistent with the Board's initial decisions applying the duty of fair representation in the hiring hall context. Thus, not long after the Board first held that a breach of the duty of fair representation constitutes an unfair labor practice,[22] it rejected the notion that mere negligence on the part of the union was sufficient to constitute a violation. The Board held in *Operating Engineers Local 18 (Ohio Pipe Line)*, 144 NLRB 1365 (1963), that a union's failure to reregister the charging party for referral, in the mistaken belief that he had already been reregistered, did not breach the duty of fair representation or violate Section 8(b)(1)(A) and (2). In so finding, the Board held that, "[m]ere forgetfulness or inadvertent error is not the type of conduct that the principles of *Miranda* were intended to reach."[23] Similarly, in *Plumbers Local 40*, 242 NLRB 1157, 1163 (1979), enfd. mem. 642 F.2d 456 (9th Cir. 1981), the Board declined to find that a union's referral of an employee instead of others occupying higher positions on the referral list breached the duty because the union's "conduct has not been shown to have been 'motivated by hostile, invidious, irrelevant, or unfair considerations' and, accordingly, at best, was no more than a judgment which, while possibly erroneous or mistaken, was not arbitrary."

It was not until 1982 that the Board first found a violation of the duty of fair representation in a hiring hall context based on negligent conduct, holding for the first time, without explanation or overruling of its prior decisions, that "any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant" breaches the duty. *Operating Engineers Local 406 (Ford, Bacon, & Davis Construction Co.)*, supra, 262 NLRB at 51. Meanwhile, the Board continued to adhere to the view that mere negligence was not enough to violate the duty in other contexts. See,

[17] Id. at 88.

[18] *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976), quoted in *United Parcel Services v. Mitchell*, 451 U.S. 56, 67 (1981) (Stewart, J, concurring), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977). See also *Humphrey v. Moore*, 375 U.S. 335, 342 (1964) ("broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope").

[19] 499 U.S. at 67. We respectfully reject the dissent's suggestion, in reliance on *Plumbers Local 32 v. NLRB*, supra, that *O'Neill* means only that the *Vaca v. Sipes* standard is applicable to both contract negotiations and contract administration, and that we must continue to apply a different, higher standard to the operation of a hiring hall, because "a union's operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer." 50 F.3d at 33. As the Supreme Court stressed in *Breininger*, the reason the duty of fair representation applies in a hiring hall context is that, in operating the hiring hall, the union is administering a contract provision. Thus, the circuit court's assertion that the standard for operation of a hiring hall can and should be different from the standard for contract administration seems to us to be unsupportable.

We note further that *Rawson* is a case in which the union, in performing its functions on the contractually established joint safety committee, could also be said to have "assumed the role of the employer." Indeed, the Supreme Court specifically described the contract provisions creating the committee as "a limited surrender [to the union] of the employer's exclusive authority over mine safety." *Rawson*, supra, 495 U.S. at 373–374. Nevertheless, the Court applied the same *Vaca v. Sipes* standard that it has applied in other contexts and held that a claim that the union had acted negligently in performing its duties on the committee did not make out a breach of the duty of fair representation.

[20] *Truck Drivers Local 692 (Great Western Unifreight System)*, 209 NLRB 446, 448 (1974).

[21] *Sheet Metal Workers Local 49 (Aztech International)*, 291 NLRB 282 (1988), affd. sub nom. *Le'Mon v. NLRB*, 902 F.2d 810 (10th Cir. 1990), vacated and remanded 499 U.S. 933 (1991), enfd. 952 F.2d 1203 (10th Cir. 1991), cert. denied 506 U.S. 830 (1992).

[22] *Miranda Fuel Co.*, 140 NLRB 181 (1962).

[23] Id. at 1368. In a more recent exclusive hiring hall case, the Board also stated that "[t]o support a finding of arbitrariness, something more than mere negligence or the exercise of poor judgment on the part of the Union must be shown." *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382, 1383 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988) (citations and internal quotation marks omitted). There, however, the union's conduct was neither negligent nor inadvertent.

e.g., *Furniture Workers Local 76B (Office Furniture Service)*, 290 NLRB 51, 63–67 (1988); *Sheet Metal Workers Local 49 (Aztech International)*, supra.

Thus, with this decision, we return to the Board's original interpretation of the duty of fair representation as applied to negligence in the hiring hall setting. Moreover, in holding that mere negligence in hiring hall operations, as in other contexts where the union is administering a contract provision, does not breach the duty of fair representation, we are following *O'Neill*'s instruction that the same "arbitrary, discriminatory, or in bad faith" standard for finding a breach of the duty applies to *all* union activity.

We stress that our holding today is a narrow one. We do not suggest that *gross* negligence in the operation of a hiring hall, of the type indicating disregard for established procedures, would not breach the duty of fair representation. Such conduct would likely be found to be "arbitrary," and possibly in bad faith, and thus within the proscription of *Vaca v. Sipes* and *O'Neill*.[24] We hold only that honest, inadvertent mistakes, such as the Union's in this case, do not, without more, constitute a breach of the duty.

The General Counsel argues, however, that even if the inadvertent failure to refer Jacoby in the right order did not violate the Union's duty of fair representation, it still violated Section 8(b)(2) and, derivatively, Section 8(b)(1)(A). The General Counsel points out that the Board has held that any departure from the established procedures of an exclusive hiring hall which results in the denial of employment to an applicant violates Section 8(b)(2) unless it is justified by a valid union-security agreement or by the union's need to perform its representational functions effectively, because any such unjustified departure inherently encourages union membership by demonstrating to users of the hiring hall the union's power over their livelihoods.[25] The General Counsel further argues that there is a derivative "restraint or coercion" flowing from such a display of unbridled power, which violates Section 8(b)(1)(A).

We find no merit to this argument. To be sure, the Board in numerous cases has found violations of Section 8(b)(2) and (1)(A) when unions failed to follow established hiring hall procedures or made referrals on the basis of purely subjective criteria, even when the conduct complained of was not based on the discriminatee's membership or nonmembership in the union, and we continue to adhere to those decisions. However, in each of those cases there was a deliberate, volitional departure from established procedure or rules or failure to apply objective standards for referrals. The Board has reasoned that in such cases, the unspoken message to all hiring hall users is that, despite what the rules say, the union—which controls their access to employment—can do as it pleases in awarding referrals, and that union considerations may therefore very well affect the ability of individuals to obtain favorable consideration in referrals. On that basis, the Board has concluded that such actions "encourage membership" in the Union within the meaning of the Act.

While this reasoning makes sense when applied to the volitional actions of union officials, it is unpersuasive when applied to simple mistakes.[26] When, as in this case, a union officer in charge of referrals intends to follow the prescribed procedures and thinks that he has done so, his inadvertent failure to do so, even to the detriment of an applicant, simply does not carry the message that applicants had better stay in the good graces of the union if they want to ensure fair treatment in referrals. Contrary to the General Counsel, in other words, mere negligence does not constitute a display of "union power" which would carry a coercive message that could reasonably be thought to encourage union membership.[27] We therefore reject the General Counsel's contention that the Union's actions here violated Section 8(b)(2) and (1)(A) even if they did not constitute a breach of the duty of fair representation.[28]

ORDER

The complaint is dismissed.

[24] Similarly, if "mistakes" are routinely made, or if they typically disfavor nonmembers, dissidents, or some other identifiable group, they may well not be found to be mistakes at all but, instead, arbitrary, discriminatory, or bad-faith conduct in breach of the duty of fair representation.

[25] See, e.g., *Ford, Bacon & Davis*, 262 NLRB at 51.

[26] In the great majority of cases in which violations have been found, the unions' departure from hiring hall procedures has not been inadvertent but has resulted from the deliberate conduct of union officials. See, e.g., *NLRB v. Iron Workers Local 433*, 600 F.2d 770 (9th Cir. 1979); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 779–781 (1984), enfd. mem. 782 F.2d 1030 (3d Cir. 1986). It is likely that, when the Board began to hold that *any* unjustified departure from hiring hall standards was unlawful, it used that broad language because it had in mind only deliberate conduct, not inadvertent mistakes.

[27] Our dissenting colleague concedes, at least "for the sake of argument," that a negligent act adversely affecting a hiring hall applicant's opportunity for employment may not "encourage union membership" within the meaning of Sec. 8(b)(2). Nevertheless, he argues that a violation has been established here because the Union failed to make Jacoby whole for loss of income and benefits after it became aware of the consequences of its mistake, thereby "cast[ing] the original act in the same light as if it had been deliberate." That theory was not alleged in the complaint or litigated at the hearing, and the General Counsel did not argue it to the judge or in his submissions to the Board. Indeed, no evidence was presented that would indicate whether or not the Union attempted to compensate Jacoby for the failure to refer him. Because the theory was neither alleged nor litigated, we conclude that it is not properly before us for consideration. *Waldon, Inc*., 282 NLRB 583 (1986).

[28] We note that the collective-bargaining agreement contains a grievance procedure for applicants claiming to be aggrieved by the application of any of the referral provisions of the agreement. To the extent the contract creates enforceable referral rights on the part of applicants, then, Jacoby can avail himself of his contractual remedies. Such rights also may be enforceable by Jacoby in a suit brought under Sec. 301; see *Rawson*, 495 U.S. at 373–374.

MEMBER BRAME, dissenting.

Does a union violate Section 8(b)(1)(A) and (2) of the National Labor Relations Act when its negligent conduct in the operation of an exclusive hiring hall results in a user's loss of an employment opportunity and when, after becoming aware of the consequences of its action, it fails to remedy the loss?

Setting aside Board precedent, judicial decisions, and the judge's findings, my colleagues hold that it does not, relying substantially on the United States Supreme Court's decisions in *Steelworkers v. Rawson*, 495 U.S. 362 (1990), and *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991). Contrary to the majority, two distinct legal theories require a finding that the Respondent Union's conduct violated both sections of the Act, and neither *Rawson* nor *O'Neill* commands a different outcome. Before following out each line of logic, I shall recapitulate the few and undisputed facts giving rise to the complaint.

I.

During the relevant period in 1994 and 1995, a project labor agreement covered performance of construction work at the "Tosco refinery" jobsite in Martinez, California. The agreement governed terms and conditions of employment, including referral for employment through an exclusive hiring hall arrangement, and bound Bechtel Corp. and signatory subcontractors, including the Employer, and the Contra Costa Building and Construction Trades Council and its constituent unions. The exclusive referral provisions at issue were included in a Master Labor Agreement, made part of the project labor agreement, between certain contractor associations and the Respondent Union.

The referral system created by the Master Labor Agreement entitled Respondent Union exclusively to dispatch to the Employer qualified workers within its jurisdiction, based on open and nondiscriminatory hiring priority lists made available to those seeking employment. The Respondent maintained five priority lists, designated by the letters "A, B, C, D, and E," as specified in the Master Labor Agreement, article II. Prerequisites for signing the "A" list included 4 or more years of experience in the trade, journeyman status, completion of 4800 hours work under a Respondent-negotiated collective bargaining agreement during the 48 months preceding registration, and status as a resident of the "normal construction labor market" as defined in the agreement. Persons signing the "A" list were entitled to priority in referral over those signing lists "B through E," which had less stringent requirements.[1]

Charging Party Joe Jacoby, a qualified registrant and 27-year member of Respondent, signed priority list "A" on December 21, 1994. Nonetheless, he was not referred to the jobsite until February 17, 1995; in the interim, individuals with less priority had been dispatched to the Employer.

Respondent's business representative, Larry Blevins, acknowledged that Jacoby had registered properly, and that he had told Jacoby it would not be a problem when Jacoby expressed his interest in working on the Tosco jobsite. Blevins testified that he thought he had telephoned Jacoby and left an answering machine message referring him to the Employer. No written record exists to corroborate Blevins's testimony on this point, and Jacoby credibly denied receiving such a message. Jacoby was dispatched only when he asked Blevins about not having been referred during a visit to the hall in February.

The parties agree that the failure to dispatch Jacoby to the Tosco jobsite was a negligent rather than a deliberate act rooted in animus. Respondent did nothing, however, to compensate Jacoby for his loss of wages and other economic benefits after becoming aware of the consequences of its negligence.

The judge found that the Respondent's conduct violated Section 8(b)(1)(A) and (2) of the Act. I agree for the reasons set forth below.

II.

The issues raised in this proceeding implicate, in relevant part, the following sections of the Act.

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.
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> Sec. 8(b)(1)(A). It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7.
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> Sec. 8(b)(2). It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).
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> Sec. 8(a)(3). It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of

[1] The judge noted that the Employer possessed the right to request by name one-half of those referred from the hiring hall, but that this did not detract from her finding that an exclusive hiring hall existed, citing *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986), enfd. 811 F.2d 149 (2d Cir. 1987), cert. denied 484 U.S. 817 (1987).

> employment to encourage or discourage membership in any labor organization.
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> . . . .
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> Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

III.

A.

"[T]he hiring hall came into being 'to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers.'" (Citation omitted.) *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 672 (1961). Particularly in the construction industry, "the contractor who frequently is a stranger to the area where the work is done requires a 'central source' for his employment needs; and a man looking for a job finds in the hiring hall 'at least a minimum guarantee of continued employment.'" (Citations omitted.) Id. at 672–673. After a review of pertinent legislative history under the Act, the *Teamsters 357* Court noted the absence of an "express ban of hiring halls," and the statute's emphasis instead upon "discrimination either by the employers or unions that encourages or discourages union membership." Id. at 674, citing *Radio Officers v. NLRB*, 347 U.S. 17, 42–43 (1954). Subsequently, however, the Court also recognized the presence of less positive aspects of hiring halls in *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989):

> When management administers job rights outside the hiring hall setting, arbitrary or discriminatory acts are apt to provoke a strong reaction through the grievance mechanism. In the union hiring hall, however, there is no balance of power. If respondent is correct that in a hiring hall the union has assumed the mantle of employer, then the individual employee stands alone against a single entity: the joint union/employer. An improperly functioning hiring hall thus resembles a closed shop, "with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." [Citations omitted.]

The Court of Appeals for the District of Columbia Circuit has similarly recognized both sides of the hiring hall equation: "An exclusive hall is not illegal per se, but because of its potential coerciveness, the union is held to a high standard of fair dealing." *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (1988). The Board itself has noted the "comprehensive authority vested in [a union] when it acts as the exclusive agent of users of a hiring hall" and the corresponding "dependence on the union" by individuals seeking employment through such an institution. *Teamsters Local 519 (Rust Engineering Co.)*, 276 NLRB 898, 908 (1985), supplemental decision 285 NLRB 75 (1987), enfd. mem. 843 F.2d 1392 (6th Cir. 1988).

Against this background, I will examine each legal theory supporting violations of both subsections (1)(A) and (2) of Section 8 of the Act, based upon Respondent's negligent conduct toward Jacoby. I shall address initially the second theory considered and rejected by my colleagues.

B.

As set forth above, Section 8(b)(2) of the Act makes it an unfair labor practice for a union to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Subsection 8(a)(3), in turn, prohibits discrimination against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Except to the extent necessary to enforce a valid union security clause permitted by a proviso to Subsection 8(a)(3), "[t]he policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." (Footnote omitted.) *Radio Officers*, supra, 347 U.S. at 40. Further, "specific evidence of intent to encourage or discourage [union membership] is not an indispensable element of proof of violation of § 8(a)(3)." Id. at 44. "[E]ncouragement of union membership is obviously a natural and foreseeable consequence" of union-caused discrimination. Id. at 52. "[I]t should be clear enough that all union-procured employment action demonstrates the union's power and thus encourages membership; and that all union action is motivated by a desire, proximate or ultimate, to encourage membership." *Road Sprinkler Fitters Local 669 v. NLRB*, 778 F.2d 8, 10 (D.C. Cir. 1985).

The application of these principles in the context of a hiring hall, where the union has assumed a role in hiring normally reserved exclusively to the employer, has resulted in the formulation by the Board and courts of a consistent framework of analysis for judging allegations of violation of Section 8(b)(2) and, necessarily, if alleged, of Section 8(b)(1)(A). Thus, in *Operating Engineers Local 406 (Ford, Bacon & Davis Construction*

Corp.), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983), we declared:[2]

> The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination, which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

Indeed, my colleagues repeat this formula, cite *Ford, Bacon & Davis* and acknowledge that, "[t]he Board in numerous cases has found violations of 8(b)(2) and 8(b)(1)(A) when unions failed to follow established hiring hall procedures or made referrals on the basis of purely subjective criteria, even when the conduct complained of was not based on the discriminatee's membership or nonmembership in the union." Here there is no dispute that the Respondent departed from hiring hall procedures in failing to refer Jacoby, nor is there any contention that the departure was justified on either of the two grounds set forth in *Ford, Bacon & Davis* and cases cited at footnote 2, supra. But, while evidently conceding that the Respondent's conduct lies within the literal parameters of the test for finding unlawful union action that affects employment in a hiring hall, my colleagues attempt to draw the following distinction:

> When, as in this case, a union officer in charge of referrals intends to follow the prescribed procedures and thinks that he has done so, his inadvertent failure to do so, even to the detriment of an applicant, simply does not carry the message that applicants had better stay in the good graces of the union if they want to ensure fair treatment in referrals. . . . [I]n other words, mere negligence does not constitute a display of "union power" which would carry a coercive message that could reasonably be thought to encourage union membership.

The majority's reasoning is flawed. For the sake of argument, I will grant the premise that a negligent act adversely affecting a hiring hall applicant's employment opportunity may not encourage union membership within the meaning of Section 8(a)(3) as interpreted by *Radio Officers*, supra. But the failure to make whole Jacoby, the affected employee, for lost income and benefits (either through direct payment or a compensatory referral), after the Respondent became aware of the consequences of its negligence, casts the original act in the same light as if it had been deliberate and carries with it the same consequences under the law outlined above.[3] Thus, employees will be encouraged in their union membership and activity to the extent they perceive their employment can be negatively impacted through a labor organization's negligence, and its failure to provide redress to employees who suffer from such conduct.

Once a violation of Section 8(b)(2) is established under a *Radio Officers* discrimination theory, a violation of Section 8(b)(1)(A) follows, irrespective of any theory involving a union's duty of fair representation (which I shall discuss in the next section of this opinion). "In the hiring hall context, the Board may bring a claim alleging a violation of § 8(b)(1)(A) against the union . . . without implicating the duty of fair representation at all." *Breininger*, supra, 493 U.S. at 82.

[2] See, e.g., to the same effect, *Operating Engineers Local 18 (William F. Murphy)*, 204 NLRB 681 (1973), remanded 496 F.2d 1308 (6th Cir. 1974), supplemental decision 220 NLRB 147 (1975), enf. denied 555 F.2d 552 (6th Cir. 1977); *Asbestos Workers Local 22 (Rosendahl, Inc.)*, 212 NLRB 913, 915 (1974); *Electrical Workers Local 592 (United Engineers & Construction Co.*), 223 NLRB 899, 901 (1976); *Plumbers Local 40 (Mechanical Contractor Assns.*), 242 NLRB 1157, 1160 (1979), enfd. mem. 642 F.2d 456 (9th Cir. 1981); *Plumbers Local 392 (Kaiser Engineers*), 252 NLRB 417, 421–422 (1980); *Rust Engineering Co.*, supra, 276 NLRB at 908; *Iron Workers Local 118 (California Erectors*), 309 NLRB 808, 811 (1992); *Stage Employees (Various Employers*), 312 NLRB 123, 127 (1993); *Road Sprinkler Fitters*, supra, 778 F.2d at 10; *Boilermakers Local 374 v. NLRB*, supra, 852 F.2d at 1358; *Radio-Electronics Officers Union v. NLRB*, 16 F.3d 1280, 1284 (D.C. Cir. 1994), cert. denied sub. nom. *Harris v. Radio-Electronics Officers Union*, 513 U.S. 866 (1994); *Plumbers Local 32 v. NLRB*, 50 F.3d 29, 33–34 (D.C. Cir. 1995), cert. denied 516 U.S. 974 (1995).

[3] The majority's assertion that this issue is "not properly before us for consideration" is without merit. A violation need not be specifically alleged in the complaint or argued by the General Counsel to be decided by the Board, so long as it is "intimately related to the subject matter of the complaint" and was fully litigated at the hearing. *Crown Zellerbach Corp*., 225 NLRB 911, 912 (1976), and cases cited therein.

There is little question that a finding of 8(b)(1)(A) and (2) violations against the Respondent for failing to correct its negligent action is intimately related to the original complaint's allegations of violations stemming from the Respondent's negligent failure to refer Jacoby to the Tosco job site. The former finding is merely a logical extension of the latter. In essence, the complaint itself, by implicitly requesting backpay for Jacoby, alleges that the Respondent has failed to make Jacoby whole for his injury. The judge ordered a backpay remedy based on a finding of a negligent failure to refer, and Respondent did not except on the ground that it had made Jacoby whole for any loss of earnings. Rather, Respondent contended it was not liable because it had committed no violation of the Act.

The majority's argument to the contrary is an exercise in "splitting hairs." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1035 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). *McClatchy* involved the difference between the Board's *finding* of an 8(a)(1) threat of discharge in the no-strike/no-picketing clause included in the employer's posting of its final offer and the complaint's *allegation* of an 8(a)(1) affirmative duty to explain the nonbinding nature of that clause. Id. at 1035–1036. The court held that the issue of the 8(a)(1) threat of discharge was "fairly tried" since the violation found and the complaint focused on the "same portion of the statute and the same set of facts." Id. at 1036. See also *Brand Mid-Atlantic*, 304 NLRB 853 fn. 4 (1991) (Board finding an 8(b)(1)(A) violation under a different theory than the one alleged in the complaint, where the complaint "put in issue the same issues" on which the Board based its findings).

As set out above, Section 8(b)(1)(A) forbids unions to "restrain or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 secures the right of employees to "self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the "right to refrain from any or all such activities." In *Radio Officers*, supra, 347 U.S. at 42, the Supreme Court observed that union-caused discrimination against an employee "deprived [him] of the right guaranteed by the Act to join in or abstain from union activities without thereby affecting his job." Thus, Respondent Union's negligent failure to refer Jacoby to employment, combined with its refusal to make Jacoby whole once it became aware of the consequences of its misconduct, restrained and coerced him in the exercise of protected rights within the meaning of Section 8(b)(1)(A) of the Act.

C.

In light of the foregoing analysis, it is apparent that my colleagues' discussion of the duty of fair representation as applied to hiring hall situations is largely beside the point. In sum, unless justified by the Union's need to enforce a valid union-security clause or its need to perform its representative function effectively, departure from hiring hall standards that results in a denial of employment is unlawful under Section 8(b)(2) and (1)(A) of the Act without resort to whether the duty of fair representation has also been breached. Nevertheless, since Board and court cases involving hiring halls often discuss and rely on a duty of fair representation analysis, in addition to a *Radio Officers* analysis (sometimes without drawing a clear distinction),[4] I will examine that theory independently. Indeed, as demonstrated below, an 8(b)(1)(A) violation grounded in the duty of fair representation necessarily implicates a violation of Section 8(b)(2) where a union has caused, or attempted to cause, an adverse change in an individual's employment status.

The duty of fair representation is a judicial principle first developed by the Supreme Court under the Railway Labor Act in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), and *Tunstall v. Locomotive Firemen*, 323 U.S. 210 (1944), and subsequently applied by the Court to cases involving unions subject to the provisions of the Act in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The classic formulation of the nature of the duty is found in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967): "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ford* and *Vaca*, however, were suits filed under Section 301 of the Labor Management Relations Act, rather than proceedings arising under Sections 7 and 8 of the Act.

The Board recognized the duty in an unfair labor practice proceeding for the first time in 1962. As summarized by the Court of Appeals for the Fifth Circuit,

> It is a fundamental principle of Board law that a breach of the union's duty of fair representation constitutes an unfair labor practice. The Board derived this duty of fair representation from the fact that section 7 of the Act, 29 U.S.C. § 157, gives employees the right to be free from unfair or invidious treatment by their exclusive bargaining agent in matters affecting their employment. *Miranda Fuel Co*., 140 NLRB 181, 185 (1962) [enf. denied on other grounds 326 F.2d 172 (2d Cir. 1963)] (footnote omitted). Although there is no explicit statutory requirement of fair representation, the Board and the courts have declared a violation of the duty to be a violation of section 8(b)(1)(A). [Citations omitted.] *NLRB v. General Truckdrivers*, *Warehousemen, and Helpers*, 778 F.2d 207 (1985).

Significantly, for purposes of this discussion, the Board in *Miranda* went on to declare,

> We further conclude that a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee. Here a question is whether such action may be said to "encourage membership in any labor organization," which finding is a necessary element of a violation of Section 8(a)(3) and 8(b)(2). 140 NLRB at 186.

The Board explained that, under *Radio Officers*, "[t]he existence of discrimination may at times be inferred by the Board," id., and concluded that, "[w]e do not interpret the Court's opinion [in *Teamsters Local 357*, supra] as permitting unions and their agents an open season to affect an employee's employment status for any reason at all—personal, arbitrary, capricious, and the like—merely because the moving consideration does not involve the specific union membership or activities of the affected employee." Id. at 188.

To dismiss the complaint and overrule existing precedent, my colleagues look to two Supreme Court decisions construing the duty of fair representation, neither involving hiring halls nor unfair labor practice proceed-

[4] See *Kaiser Engineers, Inc*., supra, 252 NLRB at 421–422; *Ford, Bacon & Davis*, supra, 262 NLRB at 51; *Rust Engineering Co*., supra, 276 NLRB at 908; *California Erectors*, supra, 309 NLRB at 811; *Stage Employees (Various Employers*), supra, 312 NLRB at 127; *Boilermakers Local 374*, supra, 852 F.2d at 1358–1359; *Plumbers Local 32 v. NLRB*, supra, 50 F.3d at 32–34.

ings, *O'Neill*, supra, 499 U.S. 65, and *Rawson*, supra, 495 U.S. 362. Neither controls the instant set of facts.

In *O'Neill*, a suit brought in Federal court under the Railway Labor Act for violation of the duty of fair representation, the court rejected a dissident employee group's challenge to a strike settlement agreement. At the outset of its opinion, the Court stated,

> We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational. Id. at 67.

Later, the Court, observed it has "also held that the duty applies in other instances in which a union is acting in its representative role, such as when the union operates a hiring hall." Id. at 77, citing *Breininger*, supra, 493 U.S. at 87–89.

In *Rawson*, a suit filed in state court, the Court found no violation of the duty of fair representation, under the "arbitrary" component of *Vaca,* based upon alleged negligent conduct in connection with mine safety inspections conducted by union representatives, and observed that, "[t]he courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today." 495 U.S. at 372–373.

The majority combines *O'Neill* with *Rawson* to reason as follows:

> [T]he Court in *Rawson* reiterated the *Vaca v. Sipes* standard, that the duty of fair representation is breached only by conduct that is "arbitrary, discriminatory, or in bad faith," and also endorsed the view that the duty is not breached by conduct that constitutes "mere negligence." In *O'Neill*, the court held that the *Vaca v. Sipes* standard applies to all union conduct and noted that the duty of fair representation applies to the operation of hiring halls. We read these decisions together to mean that "mere negligence" in the operation of an exclusive hiring hall does not give rise to a claim for breach of the duty of fair representation, even by an applicant who loses an employment opportunity as a result of the union's mistake.

The "discrimination" prong of *Vaca v. Sipes* is clearly established. The simple fact that the Union's conduct affected Jacoby's employment adversely constitutes "discrimination" within the meaning of *Radio Officers*, supra, *Ford, Bacon, & Davis*, supra, and cases previously cited at footnote. 2. Where discriminatory conduct is involved, the latitude granted for action alleged to be "arbitrary" under *Ford v. Huffman* is not available.[5]

Further, I agree with the D.C. Circuit that the Supreme Court in *O'Neill* did not intend to alter longstanding law and apply the looser *Ford v. Huffman* standard to hiring hall conduct under the "arbitrary" component of *Vaca*. See *Plumbers Local 32*, supra, 50 F.3d at 33–34. The court carefully analyzed *O'Neill*'s language in its context and found that the Supreme Court's "focus [was] on protecting the content of negotiated agreements from judicial second guessing." Id. at 33. In contrast, the court reasoned

> At issue here is the operation of a hiring hall, where the union has assumed the role of employer, as well as representative, and where the risk of judicial second-guessing of a negotiated agreement that was of such concern to the Court in *O'Neill* is simply not present. Although the Court rejected the union's attempt in *O'Neill* to differentiate between contract negotiations and contract administration, noting that no 'bright-line' can be drawn between the two . . . a union's operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer. Id.

The court then emphasized the pertinence of the Supreme Court's observation in *Breininger* that "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly increases rather than decreases."[6] Id. at 33–34, quoting *Breininger*, 493 U.S. at 489. The court also referred to its earlier holding, in *Boilermakers Local 374*, supra, 852 F.2d at 1358, that a union operating a hiring hall is held to a "high standard of fair dealing." *Plumbers & Pipe Fitters Local 32*, 50 F.3d at 34. Finally, and no less importantly, the court observed that it had "applied the 'presumption of illegality' under section 8(b)(2) that 'arises whenever an employee loses his job or hiring opportunity as a result of a union's conduct' in the operation of a hiring hall." Id., quoting from *Radio-Electronics Officers*, supra, 16 F.3d at 1284. Thus, the court was persuaded that in *O'Neill* the Supreme Court

[5] Since *O'Neill* deals only with interpretation of the "arbitrary" component of the triparitite *Vaca v. Sipes* standard, the majority's arguments based on that case have no relevance to conduct involving the operation of a hiring hall, such as that in the instant case, that independently meets the "discriminatory" component of that standard.

[6] I cannot agree with my colleagues that *Breininger* merely extended the duty of fair representation to the hiring hall arena, without also signifying an even stricter standard should apply. This is borne out not only by the language from *Breininger* quoted here by the D.C. Circuit, but also the *Breininger* Court's reference to the absence of a "balance of power" in a hiring hall where the employee "stands alone" against the "joint union/employer," 493 U.S. at 89, quoted in context in sec. III, A of this opinion.

"did not intend to weaken the standard of review applied to a union's operation of a hiring hall." Id. at 33.

Rawson is likewise distinguishable on its own terms. The Court there stated "it may well be that if unions begin to assume duties traditionally viewed as the prerogatives of management, cf. *Breininger*, at 87–88 . . . employees will begin to demand that unions be held more strictly to account in their carrying out of those duties." 495 U.S. at 373. The spot citation to *Breininger* refers to the court's discussion of a union's duty of fair representation toward hiring hall users, thus reinforcing the position that a union owes a higher duty in such circumstances, than in the traditional contract administration context involved in *Rawson*.

Thus, the Board in *California Erectors*, supra, 309 NLRB 808, which my colleagues would limit, properly found a violation of Section 8(b)(2) and (1)(A) of the Act where a union's mistake in departing from hiring hall rules cost an employee a referral. The Board correctly held that, "it need not be alleged that the Union was negligent or be shown that the departure was based on invidious or unfair considerations in order to find a violation. Such departures, absent some justification related to the efficient operation of the hiring hall, are arbitrary actions and inherently breach the duty of fair representation owed to all hiring hall users." Id. The application of a more rigorous standard for arbitrary conduct to referrals from an exclusive hiring hall is thus fully consistent with the views of the Supreme Court expressed through *Breininger*, *O'Neill*, and *Rawson*, as well as with existing Board and court of appeals law.

Here, the Respondent voluntarily assumed control of access to the Tosco refinery jobs through its exclusive hiring hall, and its negligent failure to refer Jacoby, coupled with its failure to remedy its conduct upon becoming cognizant of it, whether deemed "discriminatory" or "arbitrary," violated the duty of fair representation owed to users of its referral system and constituted an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act. Under *Miranda Fuel*, as explained, a violation of Section 8(b)(2) is made out when a duty of fair representation violation "derogate[s] the employment status of an employee." 140 NLRB at 186.

IV.

To summarize, nothing in *O'Neill* or *Rawson* stands in the way of finding violations of both subsections of the Act based on the Union's conduct toward Jacoby. These Supreme Court cases concern court suits alleging a breach of the duty of fair representation. They have no relevance at all to a legal theory that focuses on a violation of Section 8(b)(2) under *Radio Officers* and then derives a traditional 8(b)(1)(A) unfair labor practice from that predicate. Section III,B of this opinion. Alternatively, the Union's conduct is a violation of the duty of fair representation, as set out in section III,C of this opinion, and a violation of Section 8(b)(2) may be derived therefrom. By finding to the contrary, the majority severely dilutes the statutory legal protections that the Board and courts have wisely erected to protect users of hiring halls from the abuses that may follow from the concentration of power over employees' livelihoods inherent in a system administered by a "joint union/employer entity."[7]

Gary B. Connaughton, Esq., for the General Counsel.
John L. Anderson, Esq. (Neyhart, Anderson, Reilly & Freitas), of San Francisco, California, for Respondent/Union.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. At issue is whether Steamfitters Local Union 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the Respondent or Local 342) violated Section 8(b)(1)(A) and (2) of the Act in negligently failing to dispatch Charging Party Joe Jacoby (Jacoby) from its exclusive hiring hall to a position with Contra Costa Electric, Inc. (the Employer) at its Tosco refinery jobsite. The case was tried in Oakland, California, on August 21, 1995,[1] pursuant to complaint issued May 31, which in turn was based upon a charge filed March 9.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a California corporation engaged in electrical subcontracting in the construction industry. It maintains an office and place of business in Martinez, California. During the 12-month period ending May 31, 1995, the Employer provided services valued in excess of $50,000 to customers or business enterprises which themselves met one of the Board's jurisdictional standards, other than indirect inflow or indirect outflow, including a contract for services at the Tosco refinery jobsite in Martinez, California. The Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all relevant times, the Employer has been a signatory contractor to the project labor agreement for the Tosco Refining Company, Avon Refinery, Reformulated Gasoline Project, Martinez, California. The project labor agreement was negotiated between Contra Costa Building and Construction Trades Council and Affiliated Unions and Bechtel Construction Company and signatory contractors. Incorporated in the project labor agreement are the employee referral provisions of the Master Agreement between the Respondent and the Air Conditioning & Refrigeration Contractors Association of Northern

[7] *Breininger*, supra, 495 U.S. at 89.

[1] All dates are in 1995 unless otherwise indicated.

California, the Mechanical Contractors Association of Northern California, the Residential Plumbing and Mechanical Contractors Association of Northern California, the Industrial Contractors UMIC, Inc., and the Northern California Piping Contractors.

The hiring hall provisions of the Master Agreement require that the Respondent establish and maintain open and nondiscriminatory employment priority lists for workers desiring employment covered by the Master Agreement and be the sole and exclusive source of dispatches of employees under the jurisdiction of the Respondent to the Employer for employment at certain of the Employer's jobsites, including the Tosco refinery jobsite.

On December 21, 1994, Joe Jacoby signed the "A" out-of-work list. The parties agree that Jacoby was, at all times material to this proceeding, eligible for dispatch from that list as a journeyman pipefitter and instrument technician. The parties also agree that failure to dispatch Jacoby was an act of negligence and was not the result of any animus. Jacoby has been a member of the Respondent for about 27 years.

Larry Blevins, business representative of Local 342, testified that he had overseen the operations of the exclusive hiring hall for the past 6–1/2 years. He stated that there are five sign-in sheets labeled from "A" to "E." The eligibility requirements for signing the "A" list are set forth in article II of the Master Agreement and require 4 or more years experience with journeyman status and with resident status. For the particular job in question, the Employer was allowed to request one-half of its job force by name.[2] Jacoby was not requested by name. Other employees, including Jacoby, were to be referred in order of signing the out-of-work lists, with signatories of the "A" list being referred before signatories of any other list. There is no dispute that following Jacoby's signing the "A" list, other signatories were dispatched who had signed the "A" list later and who had signed lower priority lists. Jacoby was not dispatched until he called this oversight to Blevins' attention.

Blevins thought he had dispatched Jacoby before he dispatched lower priority signatories. Blevins remembered that when Jacoby signed the "A" list, Jacoby told Blevins that he wanted to work at the Tosca project and Blevins acknowledged this desire. Jacoby recalled the same conversation and testified that Blevins responded, "No problem." Blevins thought he had called Jacoby and left a message on his answering machine sometime before February 17. However, there is no written record of such an attempt. When Jacoby came into the hall in February to find out about the Tosca job, Blevins told him that he thought he had already dispatched him.

In any event, Jacoby was dispatched to work on February 17 according to Respondent's records. Although Jacoby denies that he received notice of dispatch in January, he did not deny receipt of notice of dispatch at any other time. Accordingly, I find that Jacoby was dispatched to work on February 17 based upon the written records of the Respondent.

Normally the Respondent dispatches about 100 individuals per month. During the period from late December 1994 through February 1995, the Respondent dispatched 947 individuals. Due to this unusual activity, office personnel who were unfamiliar with operation of the hiring hall were recruited to assist Blevins in effecting the dispatches.

[2] Although one-half of the referrals were by name, the parties are in apparent agreement that Respondent served as the exclusive source of non-named referrals for the Tosca jobsite and I find that this arrangement constitutes an exclusive hiring hall. *Carpenters Local 608 (Various Employers),* 279 NLRB 747 fn. 1, 754 (1986), enfd. 811 F.2d 149 (2d Cir.), cert. denied 484 U.S. 817 (1987).

III. ANALYSIS

Section 8(b)(1)(A) and (2) provide in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)].

Section 8(a)(3) provides in relevant part:

> It shall be an unfair labor practice for an employer—
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

The duty of fair representation was created by the courts and later adopted by the Board in *Miranda Fuel Co.,* 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). A union violates the duty of fair representation generally if it acts arbitrarily, discriminatorily, or in bad faith. *Air Line Pilots v. O'Neill,* 499 U.S. 65 (1991) (reaffirming the rule announced in *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). This standard applies to all union activity. "We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953) as to be wholly 'irrational' or arbitrary.'" 499 U.S. at 67.

When operating an exclusive hiring hall, a union "wield[s] additional power . . . by assuming the employer's role," [and] "its responsibility to exercise that power fairly *increases* rather than *decreases*." *Breninger v. Sheet Metal Workers Local 6,* 493 U.S. 67, 89 (1989). As the Board stated in *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.),* 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983):

> Even assuming the absence of specific discriminatory intent, a violation must be found in the circumstances of this case. The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. [Footnote omitted.]
>
> No specific intent to discriminate on the basis of union membership or activity is required; a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent.

Boilermakers Local 374 v. NLRB, 852 F.2d 1353, 1358 (D.C. Cir. 1988). "By wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies."

NLRB v. Iron Workers Local 433, 600 F.2d 770, 777 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980).

Although the Respondent does not contest the current state of Board law and agrees that, pursuant to this authority, there is support for a finding that mere negligence in failing to refer from an exclusive hiring hall is violative of Section 8(b)(1)(A) and(2),[3] it argues that Board precedent fails to heed the teachings of *O'Neill.* From *O'Neill,* the Respondent argues that a specific intent must be found to support a violation of Section 8(b)(1)(A) and (2). Despite the "wide range of reasonableness" reaffirmed in *O'Neill* and specifically applied to all union activity, the Board's "common law of hiring hall violations"[4] includes decision which appear to apply a strict standard of liability to administration of exclusive hiring halls.

As explained in *Plumbers Local 32, v NLRB,* supra, enfg. 312 NLRB 1137 (1994), the "wholly irrational" language in *O'Neill* was not convincingly indicative of an intention to weaken the standard of review applied to a union's operation of an exclusive hiring hall. Noting that *O'Neill* dealt with a challenge to the substantive provisions of a strike settlement agreement, not administration of an exclusive hiring hall, the court further stated that a, "union's operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer." Id. at 33. The court concluded that in the hiring hall context, "the union has assumed the role of employer, as well as representative, and . . . the risk of judicial second-guessing of a negotiated agreement that was of such concern to the Court in *O'Neill* is simply not present." Id.

In *Iron Workers Local 118 (California Erectors),* 309 NLRB 808 (1992), the Board stated,

> Contrary to the contentions of the Respondent, in cases such as this one, in which a departure from hiring hall rules affects employment opportunities, it need not be alleged that the Union was negligent or be shown that the departure was based on invidious or unfair considerations in order to find a violation. Such departures, absent some justification related to the efficient operation of the hiring hall, are arbitrary actions and inherently breach the duty of fair representation owed to all hiring hall users and violate the Act. See, *Operating Engineers Local 406 (Ford Construction),* 262 NLRB 50, 51 (1982).

Further, the Board continued, "The Respondent's articulated reason for not referring [the employee] having been discredited, and negligence being no defense, the failure to refer him remains unexplained and the General Counsel's prima facie case stands unrebutted." Id.

I am bound by Board precedent which states, both before and after *O'Neill,* that no specific intent is required to prove arbitrary conduct and that negligence is no defense. Accordingly, I find that the Respondent violated Section 8(b)(1)(A) and (2) in negligently, thus arbitrarily and discriminatorily, failing to refer Jacoby from its exclusive hiring hall.

CONCLUSION OF LAW

By arbitrarily failing to refer Joe Jacoby from the A out-of-work list prior to later signatories of that list and prior to signatories of lower priority lists, the Respondent engaged in unfair labor practices affecting commerce with the meaning of violated Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall make whole Joe Jacoby for any losses he may have suffered by reason of the discrimination against him. Backpay shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

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[3] See, e.g., *Plumbers Local 32 (Alaska Pipeline),* 312 NLRB 1137 (1993), enfd. 50 F.3d 29 (D.C. Cir. 1995), cert. denied 116 S.Ct. 474 (1995); *Plumbers Local 230 (AGC, San Diego Chapter),* 293 NLRB 315, 316 (1989) (failure to inform employee of change in procedures in operation of hall was arbitrary); *Boilermakers Local 374 (Combustion Engineering),* 284 NLRB 1382 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988) (union failed to demonstrate that $100 bond requirement for appeal of referral decision was reasonable); *Plumbers Local 40 (Mechanical Contractors),* 242 NLRB 1157, 1161 (1979), enfd 642 F.2d 456 (9th Cir. 1981) (union unable to rebut prima facie showing of arbitrariness in removing individual's name from referral list for no apparent reason).

[4] *Laborers Local 423 (GFC),* 313 NLRB 807 (1994).